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IN THE

Supreme Court of the United States

October Term 1967
No. 714

JONES LUMBER COMPANY,

Petitioner,

vs.

DEL NORTE COUNTY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Court of Appeal of the State of California, First Appellate District, is reported in 251 A.C.A. 736, 59 Cal. Rptr. 644.

Petition for Hearing by the Supreme Court of the State of California was denied without opinion.

Jurisdiction.

The petition herein seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). This provision does not afford jurisdiction, as there is not raised herein any substantial or important Federal question.

Jurisdiction is also wanting for failure of petitioner to seasonably raise a Federal question in the State Courts; and decision of the Court of Appeal of the State of California was based on adequate, independent, State grounds. These points will be discussed fully in the argument.

Question Presented.

Where it is established that petitioner is assessed on a basis below that prevailing generally throughout the county, and thereby received preferential treatment to the detriment of county taxpayers generally, is petitioner entitled to further preferential treatment because one single other taxpayer received additional preferential treatment not accorded petitioner?

ARGUMENT.

I.

The Decision of the Court of Appeal of the State of California Involved No Substantial and Important Federal Question.

The basis of the petition is that petitioner's taxes were erroneous and void because the method of discounting value for size of holding was disapproved by the Court of Appeal of the State of California. That Court held the method would result in preferential treatment to the owners of large holdings of timber, including petitioner.

The Court of Appeal of the State of California held, that while the method used was improper, petitioner was not entitled to additional preferential treatment over what it had previously secured. See App. to Pet. Writ, pp. 25-26:

> "The remedy chosen by the trial court was to reduce plaintiff to Simpson's 48% assessment. This but exacerbates the discrimination. It increases the invalid discount already given to plaintiff, one of the large timber owners of the county. Even if the assessments of all county owners of timberlands were reduced to 48% of true value, the burden of the owners of other property—homes, shops and personal property—would be saddled with a disproportionate share of the county budget. . . .
>
> "We cannot, however, affirm the judgment which but accentuates the improper existing discrimination. Plaintiff's assessment, which already has been invalidly reduced below true value, should

not be still further reduced. Plaintiff has not shown an overassessment of his property. Rather, he has shown that it was assessed at too little, although still at a higher rate than that of Simpson. Our determination herein doubtless will assure against future use of the discount sale, and lead to proper assessment practices henceforth. No greater benefit to the payers of 1963-64 taxes is within our power."

This Court has approved substantially the same holding and reasoning. In *Sioux City Bridge Co. v. Dakota County,* (1923) 260 U.S. 441, at page 446 (43 S.Ct. 190, 192; 67 L.Ed. 340, 343), this Court stated:

"This court holds that the right of a taxpayer whose property *alone* is taxed at 100% of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."

Sunday Lake Iron Co. v. Wakefield, (1918) 247 U.S. 350, 353; 38 S. Ct. 495, 496; 62 L.Ed. 1154, 1156:

"The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffers clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and different circumstances to adopt valuations not rela-

tively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration, nor was there sufficient evidence before the board to justify immediate and general revaluations. The very next year a diligent, and, so far as appears, successful, effort was made to rectify any inequality. The judgment of the court below must be affirmed."

Petitioner assumes that timber land is a separate class of property for purposes of assessment. Under California law all tangible property, real or personal in nature, must be taxed in proportion to its market value and at the same ratio or assessment percentage of market value.

Simms v. County of Los Angeles, (1950) 35 C. 2d 303; 217 P.2d 936;

DeLuz Homes Inc. v. San Diego, (1955) 45 C.2d 546; 290 P.2d 544.

Under California law, in establishing inequitable or unjust burden of taxation the taxpayer is required to show that the assessed value placed upon his property is excessive compared with the average assessment of all other property in the county.

Wild Goose Country Club v. County of Butte, 60 C.A. 339, 212 P. 711 (1922);

Mahoney v. San Diego; 198 C. 388, 397; 245 P. 189; 245 P. 189, 192-193 (1926);

Best v. County of Los Angeles, (1964) 228 C.A.2d 655; 39 Cal.Rptr. 655;

Birch v. County of Orange, (1927) 88 C.A. 82, 86; 262 P. 788, 789-790.

In *Best v. County of Los Angeles, supra,* the court stated at page 660:

> "when it is shown that his assessment is not disporportionate to that of other property generally, to reduce his assessment merely because the property of a few others is assessed too low would only increase the inequalities already existing in the assessment roll of the county."

In *A. F. Gilmore v. County of Los Angeles,* (1960) 186 C.A.2d 471, (9 Cal.Rptr. 67, 71), the Court of Appeal stated the basic rule at page 477:

> "The issue before a reviewing court is whether there was substantial evidence before the board upon which its determination could have been founded. The inquiries which the board makes are: (1) what is the fair market value of the property in question; and (2) whether the assessed value thereof is equal to the product of fair market value and the ratio of assessment values to fair market value prevailing generally throughout the county."

The decisions of the appellate courts of the State of California, on the identical question, are in accordance with the applicable decisions of this Court, and by reason thereof, no substantial or important Federal question is raised justifying the exercise of this Court's jurisdiction.

Rule 19 U.S.S.Ct. Rules;

Rice v. Sioux City Cemetery Co., (1955) 349 U.S. 70; 75 S.Ct. 614; 99 L.Ed. 897;

Layne & Bowler Corp. v. Western Well Works, Inc., (1923) 261 U.S. 387; 43 S.Ct. 422; 67 L.Ed. 712;

Zucht v. King, (1922) 260 U.S. 174; 43 S.Ct. 24; 67 L.Ed. 194.

II.

Decision of the Court of Appeal of the State of California Is Based Upon Adequate Independent State Grounds Therefor.

The California courts have consistently held that a taxpayer, complaining of the impropriety of his assessment, must show that the result is to place a greater burden of tax consequences upon his property than upon other property generally throughout the county.

Wild Goose Country Club v. Butte, (1922) 60 C.A. 339, 212 P. 711;

A. F. Gilmore Co. v. County of Los Angeles, (1960) 186 C.A.2d 471, 9 Cal.Rptr. 67;

Rancho Santa Margarita v. County of San Diego, (1933) 135 C.A. 134, 26 P2d. 716;

Best v. County of Los Angeles, (1964) 228 C.A.2d 655, 39 Cal.Rptr. 665;

Leach v. County of Los Angeles, (1964) 228 C.A.2d 634, 39 Cal.Rptr. 654.

In *Simms v. County of Los Angeles,* (1950) 35 C.2d 303, 217 P.2d 936 (Petition for Writ of Certiorari to this Court denied) the taxpayer complained of the classification of bank trade fixtures as real property whereas other trade fixtures were classified and assessed as personal property. In refusing any tax relief the California Supreme Court stated, page 313:

> "No authority is cited in support of this contention, and we are of the view that mere differences in the classification of like property without attendant inequality of tax burdens do not violate the equal protection clause of the Fourteenth Amendment. . .

"The statement in *Trabue Pittman Corp. v. County of Los Angeles,* 29 Cal. 385, 392 [175 P. 2d 512], that 'There can be uniformity of taxation only to the extent that there is a uniform classification of real and personal property,' is not authority for the proposition that unjustified differences in classification are interdicted by the California Constitution when there is no resulting inequality of tax burdens."

To establish inequality in assessment the taxpayer must show, before the local board of equalization, by competent evidence, that either the market value of his property is less than the determination thereof by the County Assessor, or if the market value be conceded, that the assessment ratio to market value applied to his property is higher than that applied to other property generally throughout the county.

A. F. Gilmore v. County of Los Angeles, (1960) 186 C.A.2d 471; 9 Cal.Rptr. 67;

Best v. County of Los Angeles, (1964) 228 C.A.2d 655, 39 Cal.Rptr. 665;

Leach v. County of Los Angeles, (1964) 228 C.A.2d 634, 39 Cal.Rptr. 654.

Mere errors in method, without resultant discrimination or imposition of an unfair tax burden does not excuse a taxpayer from a payment of his taxes.

Simms v. County of Los Angeles, (1950) 35 C.2d 303; 217 P.2d 936;

Crothers v. County of Santa Cruz, (1957) 151 C.A.2d 219; 311 P.2d 557;

Alberts v. Board of Supervisors, (1961) 193 C.A.2d 225; 14 Cal.Rptr. 72.

Even though the method used is disapproved, unless a taxpayer has been required to pay more than his fair share of the tax burden, no relief is granted.

In *Rancho Santa Margarita v. San Diego County, supra,* page 151, the Court stated:

> "The members of the board had a choice of three courses: (1) To reduce plaintiff's assessment to that of the adjoining lands, thus relieving plaintiff of a large part of its just share of taxes, at the expense of all other taxpayers whose lands were assessed at the same relative value as plaintiff's; (2) to make a horizontal reduction in the assessment of all property except that which was under-valued; (3) to let the assessment stand, as they did, and correct the inequality the following year. The burden of proof was on the plaintiff to show fraud or its equivalent and it cannot be said, under the evidence, that the action of the board, in adopting the third rather than either of the other courses open to it, constituted fraud or the equivalent of fraud."

In the instant case the Court of Appeal of the State of California found that petitioner here had, by virtue of the improper or erroneous method used, been given preferential treatment at the expense of taxpayers generally. It refused to accentuate the discrimination. (*supra,* p. 3). Such decision was in conformity of the established law as set forth above.

Crothers v. County of Santa Cruz, (1957) 151 C.A.2d 219; 311 P.2d 557;

Alberts v. Board of Supervisors, (1961) 193 C.A.2d 225; 14 Cal.Rptr. 72.

It accords with the decision of this Court.

Sunday Lake Iron Co. v. Wakefield, (1918) 247 U.S. 350; 38 S.Ct. 495, 62 L.Ed. 1154.

The decision of the highest court of the state having jurisdiction was not dependent on a Federal question for the determination of the cause. This matter was presented, argued and decided on the basis of California State law. Therefore, the necessary basis for a petition to this Court is wanting.

Lynch v. New York, (1934) 293 U.S. 52, 54; 55 S.Ct. 16, 17; 79 L.Ed. 191, 193;

Henry v. State of Miss., (1965) 379 U.S. 443; 85 S.Ct. 564; 13 L.Ed. 2d 408.

III.

Petitioner Failed to Seasonably Raise a Federal Question in the State Courts, Therefore, This Petition Is Too Late.

The record herein discloses [R. 4] that the case was pled and presented solely on state law through the decision of the Court of Appeal of the State of California. The only reference to a Federal question is contained in the brief in support of the petition for hearing by the Supreme Court of the State of California, filed by petitioner herein, wherein petitioner claimed that the decision was contrary to *Township of Hillsborough v. Cromwell,* (1946) 326 U.S. 620; 66 S.Ct. 445, 90 L.Ed. 358.

A Federal question must be raised at the first opportunity, and an attempt to raise it on a petition for rehearing for the first time, is too late.

Loeber v. Schroeder, (1893) 149 U.S. 580; 13 S.Ct. 934, 37 L.Ed. 856;

American Security Co. v. Baldwin, (1932) 287 U.S. 156; 53 S.Ct. 98; 77 L.Ed. 231.

It cannot be raised by reference to briefs and statements which are not part of the record.

Lynch v. New York, (1934) 293 U.S. 52; 55 S.Ct. 16; 79 L.Ed. 191.

Where the decisions of the state courts have consistently denied relief upon the ground, as here, that the relief sought would exacerbate the discrimination, petitioner should have anticipated such decision and raised the Federal question in the initial proceedings. Petitioner cannot plead ignorance of prior California decisions. Its contention that the Federal question was raised at the first opportunity is without substance.

Herndon v. Georgia, (1935) 295 U.S. 441; 55 S.Ct. 794; 79 L.Ed. 1530.

Conclusion.

Wherefore, it is submitted that the Writ of Certiorari applied for should be denied.

Respectfully submitted,

LOUIS R. BAKER,
WILLIAM W. SPEER,
FRANCIS H. O'NEILL,
Attorneys for Respondent.